ELEPHANT GYPSUM SDN BHD

v.

ELEVIC TRADING SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI JC
[CIVIL SUIT NO: D1(D9)-22-377-1998]
16 APRIL 2001

CONTRACT: *Guarantee - Guarantor - Undated guarantee - Whether valid - Absence of monetary limit in guarantee - Whether sufficient ground to invalidate guarantee*

CONTRACT: *Guarantee - Demand for payment -"Principal Debtors" clause in guarantee - Whether inclusion of clause obviated necessity for prior demand - Liability of defendants - Whether guarantee binding*

In this claim the plaintiff sued the 2nd and 3rd defendants (the "defendants") as guarantors of some goods sold and delivered to the 1st defendant. The defendants did not deny they had signed the guarantee, but disputed it on grounds that: (i) the guarantee was undated at the time of signing; (ii) the monetary limit on the guarantee was left blank; and (iii) there was no valid letter of demand issued by the plaintiff.

Held:

[1] Even though the guarantee was not dated, it was valid because it was signed by the defendants before it was stamped. Furthermore there were no allegations and evidence of fraud or misrepresentation in signing the said guarantee.

[2] No monetary limit in the guarantee could have made it an unlimited guarantee. Such guarantee is valid in law. The absence of monetary limit being stated in the guarantee did not prejudice the defendants. It was not a sufficient ground to invalidate the said guarantee.

[3] Inclusion of the "principal debtors" clause in para. 1 of the guarantee indicated that no prior demand was strictly necessary to institute a claim against the defendants.

[Judgment for plaintiff with costs.]

Case(s) referred to:
D&C Finance Bhd v. Che Mohamad Che Kob & Ors, Kuala Lumpur High Court (Bahagian Dagang), Guaman Sivil Bil D4-24-3387-87 ***(not foll)***
Esso Petroleum Co Ltd v. Alston Bridge Porperties Ltd [1975] 1 WLR 1474 ***(foll)***
First National Bank of Chicago v. Tan Lai Wah [1981] 2 MLJ 100 ***(foll)***
Privy Council [1984] 1 MLJ 150
Public Bank Bhd v. Chan Siok Lie & Ors [1989] 2 MLJ 305 ***(foll)***
Siang Yam Beng v. Marushin Conneries (M) Sdn Bhd & Anor [1995] 4 MLJ 691 ***(foll)***

Legislation referred to:
Contracts Act 1950, ss. 79, 80

Other source(s) referred to:
O'Donovon's Modern Law of Guarantee, p 380
Rowlatt on Principal and Surety, 4th edn, p 115

For the plaintiff - AS Gill (Sunita Gopal); M/s AJ Arifin, Yeo and Harpal
For the defendants - Saran Singh; M/s Saran Singh & Co

Reported by Raja Vishnu Sivarajah

JUDGMENT

Ramly Ali JC:

Introduction

The plaintiff's claim against the defendants is based on goods sold and delivered to the 1st defendant sometime in November and December 1994. The 2nd and 3rd defendants were sued as the guarantors. The said goods sold and delivered by the plaintiff were gypsum boards. At all material times (and until the day of the hearing) the 2nd and 3rd defendants were the only shareholders and directors of the 1st defendant company. From the records available, the nature of business of the 1st defendant is dealing in building materials, gypsum board and ceiling board.

When the case come up for hearing on 23 February 2001, the 1st defendant, being represented by the 2nd and 3rd defendants, admitted liability as claimed by the plaintiff, and accordingly a consent judgment was entered against the 1st defendant. The hearing went on the same day (23 February 2001) against both the 2nd and 3rd defendants as guarantors, based on a guarantee document duly signed by both of them (exh. P2). Both the 2nd and 3rd defendants did not dispute the fact that they had signed the guarantee (exh. P2). However, both the 2nd and 3rd defendants disputed the guarantee on the following grounds:

i) that the guarantee was undated at the time of signing;

ii) that the monetary limit on the guarantee was left blank; and

iii) that there was no valid letter of demand issued by the plaintiff;

Is An Undated Guarantee Valid?

The learned counsel for the 2nd and 3rd defendants argued that the said guarantee (exh. P2) (although was stamped on 24 October 1994) is not valid because it is undated when signed and no particulars about the financial limit of the guarantee. It was left blank. The learned counsel for the plaintiff, on the other hand, contended that the said guarantee is valid because it was executed before being stamped and it satisfied all the relevant requirements under s. 79 of the Contracts Act 1950. There is no allegation of and no evidence of fraud and misrepresentation in signing the said guarantee.

What are the requirements or ingredients for a valid guarantee under s. 79 of the Contracts Act 1950. Section 79 reads:

> A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of which default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written.

Section 79 is a general section about guarantee. The relevant ingredients under the section are:

i) a guarantee may be oral or written;

ii) there must be a principal debtor;

iii) the primary liability of the principal debtor must exist at the time of the contract of guarantee or must be contemplated.

In the present case, the guarantee (P2) had satisfied all the above requirements. Section 80 of the same Act requires "consideration" for the guarantee. Section 80 reads:

> Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

In the present case, it is the delivery of the goods (gypsum board) to the 1st defendant (which is proven by the consent judgment against the 1st defendant) that constitutes a valid consideration for the said guarantee.

Even though the said guarantee was not dated, the evidence of all the witnesses (PW1, DW1, and DW2) is clear that the said guarantee was infact signed by both the 2nd and 3rd defendants before it was duly stamped on 24 October

1994, and it refers to transactions between the 1st defendant and the plaintiff as pleaded in para. 4 of the statement of claim. In all the circumstances, the issue of the date does not arise as there have been no allegations of and no evidence of fraud or misrepresentation. In *Siang Yam Beng v. Marushin Conneries (M) Sdn Bhd & Anor* [1995] 4 MLJ 691, Abdul Malik Ishak J held that the guarantee agreement was valid even though it was undated when signed, because it had been signed by a director and there was no fraud or misrepresentation. The learned judge said:

> Next, to whittle down the legal impact of the guarantee agreement, it was argued that though *Siang* in the present suit had signed that guarantee agreement, yet at the time of signing it was said that the guarantee agreement was undated. It is trite that when a party signs a contract knowing it to be a contract which governs the relations between them, then to borrow the words of Denning LJ in the case of *Curtis v. Chemical Cleaning and Dyeing Co Ltd* [1951] 1 All ER 631 at pp. 633-634, 'his signature is irrefragable evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation. Applying this principle of law to the present case, the admission of *Siang* in the present suit that he signed the guarantee agreement ought by itself tie him to the guarantee agreement without having to consider the question of fraud and misrepresentation. Taking a step further and applying *L' Estrange v. F. Graucob Ltd* [1934] 2 KB 394, where Scrutton LJ said (at p. 403): "When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he had read the document or not". Applying *L' Estrange* to the facts of the present case, it matters not that the guarantee agreement was undated when *Siang* in the present suit signed it because he signed that document in his capacity as a director of Malindo (the first Defendant in the 1992 suit) and without any allegations of fraud or misrepresentation.

On the above authorities I am of the opinion that the said guarantee (P2) is valid and binding on both the 2nd and 3rd defendants although it was undated when signed.

Monetary Limit Not Written In The Guarantee

On the issue of monetary limit not written in the guarantee when signed by the 2nd and 3rd defendants, I am of the opinion that, it makes it an unlimited guarantee. Such guarantee is valid in law. In *First National Bank of Chicago v. Tan Lai Wah* [1981] 2 MLJ 100, Singapore High Court recognised the existence and legality of unlimited guarantees infavour of the plaintiffs securing the overdraft account. The appellant's appeal to the *Privy Council* [1984] 1 MLJ 150, on the ground that "she did not know that the document which she signed was a guarantee for an unlimited amount otherwise she would not have signed it", was dismissed.

In our present case, both the 2nd and 3rd defendants are known to the plaintiff's director (PW1) for many years. At all material times, both the 2nd and 3rd defendants were the only shareholders and directors of the 1st defendant. They control the management and business of the 1st defendant. They ought to know the quality and the price of the goods ordered by the 1st defendant during the relevant periods. They ought to know that the guarantee extends to a series of transactions or order during those period. Paragraph 1 of the said guarantee provides:

> 1. In consideration of your having at our request agreed to supply goods or continue to supply goods or otherwise to grant trading credit in such sum or sums and for so long as you may think fit.

The above provisions clearly indicated that the supply of the goods in question to the 1st defendant was at the 2nd and 3rd defendants' request; the plaintiff may continue to supply the goods to the 1st defendant so long as the plaintiff many think fit; the plaintiff may grant trading credit to the 1st defendant in such sum or sums for so long as the plaintiff think fit.

Thus the fact that the monetary limit was not stated or written in the guarantee (P2) would not in any way prejudiced them. That is not a sufficient ground to invalidate the said guarantee.

Whether There Was A Valid Letter Of Demand On The Guarantee

The 2nd and 3rd defendants contended that the letter of demand (P3 and P4) were not valid and ineffective on the following grounds:

i) the said letters of demand (P3 and P4) were dated 9 January 1998, but para. 6 of the statement of claim pleads the letter of demand dated 5 January 1997;

ii) the said letters of demand (P3 and P4) were not properly and validly served on both of them because they were sent at an address not as stated in the guarantee;

iii) the said letters of demand (P3 and P4) stated that the guarantee in question dated 24 October 1994, while the guarantee produced in court (P2) is undated but stamped on 24 October 1994 and

iv) the said letters of demand were sent by the plaintiff's solicitors and not by the plaintiff themselves.

The first question to consider on this issue is whether the guarantee is an "on demand" guarantee or not. If it is an "on demand" guarantee, then a proper and valid letter of demand must be issued and sent to the guarantors (2nd and 3rd defendant). No doubt the words "upon demand" were used in

para. 1 of the guarantee. However the use of those words is not conclusive proof to say that the said guarantee is an "on demand" guarantee. The whole document must be looked at. Paragraph 1, lines 6-7 of the said guarantee states that:

> WE, the UNDERSIGNED GUARANTORS, whose names and addresses appear in the First Schedule herewith annexed (hereinafter referred to as "the Guarantors") jointly and severally guarantee as Principal Debtors and not merely as sureties the payment ... .

The above statement in effect makes the guarantors (2nd and 3rd defendants) "principal debtors" and therefore the existence of the guarantors' liability is no longer collateral to the liability of the 1st defendant and as such, no prior demand is strictly necessary to institute a claim against them. Shankar J in *Public Bank Bhd v. Chan Siok Lie & Ors* [1989] 2 MLJ 305 (at p. 308) said that:

> There is no general rule that in all cases, regardless of the terms of the document, a prior precise demand is a *sine qua non* to the commencing of an action. Nor is there any general rule that a prior notice must be given in all cases.

In *Rowlatt on Principal and Surety*, 4th Edn, p. 115, it is stated that if a surety's obligation is to pay the collateral sum (which differs from a promise to pay on demand a present debt owing by the promisor) then an action against him can be brought at once without any other demand than the writ. A clearer picture on this issue is given in *O'Donovon's Modern Law of Guarantee* (at p. 380) when it says that:

> even though the amounts under the guarantee are expressed to be payable "on demand", the inclusion of a "principal debtor" clause in the body of a guarantee may obviate the necessity for the creditor to make a demand.

The same comments were made by Walton J in *Esso Petroleum Co Ltd v. Alston Bridge Porperties Ltd* [1975] 1 WLR 1474. Thus in *Public Bank Bhd v. Chan Siok Lie (supra)* Shankar J held:

> Where the effect of a guarantee agreement is to make the guarantors principal debtors, the necessity for a demand could be obviated because the character of the agreement under which payment is sought is no longer strictly collateral.

I am satisfied that the above propositions correctly represent the position of the issue concerned under our law. The inclusion of the "principal debtors" clause in para. 1 of the guarantee (P2) in our present case clearly indicates that the necessity for a demand could be obviated.

In any event, if I am said to be wrong on this issue, and assume that a prior demand is required in this case, I will next consider whether there was any proper and valid demand ever made by the plaintiff on the guarantee. The relevant letters of demands (P3 and P4) are dated 9 January 1998. Even though the said letters of demand (P3 and P4) are said to be dated 5 January 1997 in the statement of claim, it does not invalidate the letter of demand (P3 and P4). The fact still remains that a letter of demand had been issued to each of the defendants as for P3 and P4.

The 2nd and 3rd defendants argued that the letters of demand were not properly and validly served on them as they were sent to an address not as stated in the guarantee.

Clause 16 of the guarantee (P2) provides:

> 16. Any notice or demand hereunder to the guarantors shall be deemed to have been sufficiently given if sent by prepaid letter post to the address in Malaysia last known to you OR stated herein and shall be assumed to have reached the addresses in ordinary course of post.

Under cl. 16, the plaintiff is entitled to send the letter of demand to any other address in Malaysia last known to the plaintiff, besides the address stated in the guarantee. It is up to the plaintiff to make its own enquiry to trace the whereabout of the 2nd and 3rd defendants when the letter of demand is to be sent out. The last known address of the defendants may differ from that of the one stated in the guarantee. The address of both the defendants as stated in the guarantee is at KTM Gudang No: 4, Lot 1-3 Jalan Tun Sambanthan, 50470 Kuala Lumpur. However, based on the informations obtained from Pejabat Pendaftar Syarikat (ROC) Malaysia on 6 October 2000, the address of both the defendants is at No. 152, Persiaran Burhanuddin Helmi, Taman Tun Dr Ismail 60000 Kuala Lumpur. There's no indication that the 2nd and 3rd defendants had notified the plaintiff of the change of addresses. Both the letter of demand (P3 and P4) were sent to two addresses i.e:

1. No. 152, Persiaran Burhanuddin Helmi,
   Taman Tun Dr Ismail 60000 Kuala Lumpur
   (as the last knows address in Malaysia); and

2. KTM Gudang No. 4,
   Lot 1-3 Jalan Tun Sambanthan,
   50470 Kuala Lumpur
   (as the address stated in the guarantee)

Exhibit P4(a) is the proof of posting by prepaid registered notices of demand on both the addresses given above. Thus, the plaintiff had fulfilled the requirements under cl. 16 of the said guarantee.

The said letters of demand (P3 and P4) made reference to the "guarantee dated 24 October 1994". As stated earlier, the said guarantee was undated. However, it was held to be valid. The plaintiff explained that it used the date "24 October 1994" because that is the date when the said guarantee was stamped. That is the only date available in the guarantee. So, for the purpose of reference the plaintiff had been using that date as the date of the guarantee. In para. 2 and 3 of the said letters of demand it was stated:

> We are informed by our client that by a letter of guarantee dated 24th October 1994 you have guaranteed the debts of and for the benefit of Elevic Trading Sdn. Bhd. owing to our client.
>
> In consideration of your guarantee our client have sold and delivered goods to Elevic Trading Sdn. Bhd. to the equivalent sum of RM440,204.38 for the period of November and December 1995.

Even though the date "24 October 1994" may not be the correct date and the said guarantee was actually undated, the above two paragraphs in the said letters of demand (P3 and P4) gave sufficient identification that the said guarantee referred to in those letters of demand actually referred to the same guarantee that both the 2nd and 3rd defendants had signed (P2), which they have admitted signing. Both the 2nd and 3rd defendants are not prejudiced on that issue.

The last issue raised by the 2nd and 3rd defendants is that the said letters of demand (P3 and P4) are bad and invalid because they were sent by the plaintiff's solicitors, but not by the plaintiff itself. Reliance was placed by the defence on the case of *D&C Finance Bhd v. Che Mohamad Che Kob & Ors*, Kuala Lumpur High Court (Bahagian Dagang), Guaman Sivil Bil. D4-24-3387-87 where Shaikh Daud J (as he then was) held that the letter of demand was not valid because it was sent by the plaintiff's solicitors, but not by the plaintiff itself. The operative wordings in that case is "upon written demand being made to me by you....". The judge held that the word "you" means the plaintiff and not its solicitors as "you" differs from "by you or your agents etc". In our present case, the guarantee (P2), has no such requirement. The wordings used in P2 are "upon demand made on us ..." As such, I am of the view that the ruling in the said case cannot apply to this case. In our present case, there is no indication in the whole body of the guarantee to require that the demand must be made by the plaintiff itself.

Decisions

In the circumstances, I have no hesitation to hold, in this case that, in view of the "principal debtor" clause in para. 1 of the guarantee (P2), no prior demand is strictly necessary to institute claim against the 2nd and 3rd defendants. Alternatively, in the event prior demand is necessary, I am satisfied

that the plaintiff had discharged its burden under the guarantee by sending a valid letter of demand to each of the 2nd and 3rd defendants as required under cl. 16 of the said guarantee.

On the above considerations, I am satisfied that the said guarantee (P2) is a good and effective guarantee that binds both the 2nd and 3rd defendants on its terms. Thus both the 2nd and 3rd defendants are liable for the amounts claimed by the plaintiff on the guarantee. Therefore, I enter judgment for the plaintiff against both the 2nd and 3rd defendants with costs.